

No. 1042 103

FILED

MAY 25 1940

CHARLES ELMORE GROPLEY  
CLERK

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1939

UNITED STATES OF AMERICA,  
*Plaintiff-Respondent,*

AGAINST

ADLER'S CREAMERY, INC.,  
*Defendant-Petitioner.*

**Petition for a Writ of Certiorari to the United States  
Circuit Court of Appeals for the Second Circuit.**

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*Defendant-Petitioner.*

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**PETITION.**

**Petition for a Writ of Certiorari to the United States  
Circuit Court of Appeals for the Second Circuit.**

*To the Honorable Justices of the Supreme Court of the  
United States of America:*

The petition of Adler's Creamery, Inc. respectfully alleges:

1. That your petitioner is a corporation organized and existing under the laws of the State of New York, having its office and principal place of business in the village of Fort Plain, Montgomery County, New York.

2. That your petitioner is engaged in the business of operating a milk receiving plant at Fort Plain, New York, in which it receives milk produced by farmers in the vicinity; that your petitioner also handles milk produced by farmers in the vicinity of Herkimer, Herkimer County, New York, delivered to a similar plant in that village; that all milk handled by your petitioner has been produced within the State of New York and has always been delivered to the aforesaid plants by the producers in the neighborhood and such production and delivery has been wholly intrastate.

3. That after testing and cooling, the milk received by your petitioner is transported by tank trucks, routed wholly within the State of New York, into the City of New York where it is delivered to an associated company, Samuel Adler, Inc., a milk dealer who sells such milk, after pasteurizing and bottling, to store-keepers, restaurants and other distributors for consumption within the City of New York.

4. That in the course of its handling, from producer to final consumption, your petitioner's milk is never physically in contact with, or intermingled with, milk which might be characterized as "interstate" milk, viz.: milk which is either produced outside the State of New York or which, if produced within the State, finds its way into the market through interstate channels, or by the use of interstate facilities.

5. That on August 5th, 1938, the Secretary of Agriculture of the United States issued an order, pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, known as Order No. 27; that on August 25th, 1938, the Commissioner of Agriculture and Markets of the State of New York issued an order pursuant to the provisions of Section 258-m of the Agriculture and Markets Law of the State of New York, known as Order No. 126; that each of said orders, in similar terms, seeks to regulate the handling of milk approved for sale in the New York City milk marketing area; that the Federal Order affects such handling "as is in the current of interstate commerce or which directly burdens, obstructs or affects interstate commerce"; that the State Order applies generally to the handling of milk not within the purview of the Federal Order.

6. That the Federal Order provides that it is to become effective concurrently with the State order "to which this order shall be complementary" (Art. X, § 1); that both orders by their terms became effective on September 1,

1938; that official copies of the said Orders are incorporated in the record, the Federal Order at page 11, and the State Order at page 61.

7. That the material terms of the Federal Order (with which the terms of the State Order are identical) were summarized by this Court in its opinion in the case of *United States v. Rock Royal Co-Operative, Inc.*, 307 U. S. 533, in which opinion, also, the pertinent provisions of the law are set forth; that the Orders sought to bring about the payment of a uniform price to each producer of milk approved for sale in the marketing area by means of a formula substantially as follows: Milk is classified according to its utilization. Milk shipped in fluid form (called Class I milk) commands a higher price than milk used for other purposes, such as cream, cheese, butter and other dairy products. A market administrator appointed pursuant to the Order is required to compute the total price of all milk in the various classes on the basis of reports of utilization. He then computes a weighted average, subject to numerous adjustments, and fixes a uniform price to be paid to all producers. Those handlers whose milk is used largely in fluid form and thus should pay more than the uniform price, pay such uniform price to their producers and, in addition, pay the difference between the uniform price and the stated value of their milk into a "producer settlement fund" (usually called the "pool"). Handlers whose utilization of milk in lower classifications brings their stated price below the uniform price receive such difference from the pool and remit to their producers such uniform price.

8. That the utilization of the milk handled by your petitioner is ordinarily, to a large extent, fluid or Class I utilization and the classified value of such milk handled by your petitioner exceeds the uniform price.

9. That when the State and Federal Orders became effective, your petitioner fully complied therewith and paid

into the pool for the months of September and October, 1938, sums aggregating \$44,527.48; that during that time the wholesale market for milk in the City of New York gradually became depressed and dropped rapidly from 9¾¢ per quart to as low as 8¢ per quart.

10. That the following facts appear from the Government's own proof in this suit; viz., that, in order to comply with the order at a reasonable profit, a wholesale market of 9¾¢ per quart is necessary (record, fol. 47); that when the United States District Court declined to grant a preliminary injunction in the *Rock Royal* case, enforcement of the Federal Order became impossible and that "price-cutting gradually accelerated and continued unabated until after the decision of the Supreme Court upholding the validity of Order No. 27" (record, fol. 50); that "other handlers were forced to meet these prices in order to retain their business and the general level of prices dropped to disastrously low levels" (ibid); that "the failure of summary enforcement against the defendants (in the *Rock Royal* case) together with the resulting disorderly marketing conditions made effective enforcement against other handlers impossible" (fol. 51); that, as a result, after the adverse decision of the District Court in the *Rock Royal* case, the Orders were suspended as of January 31st, 1939.

11. That by reason of the said conditions existing during the period from November 1st, 1938, to January 31st, 1939, compliance with the terms of the Order by your petitioner, as well as by virtually all other handlers of fluid milk, became impossible and your petitioner was unable to pay the "pool obligation" for those months; that the record shows beyond question that your petitioner conducts its business in a most efficient and economical manner and that the inability of your petitioner to pay the minimum price was solely the result of such market conditions and not of any competitive disadvantage by reason of inefficiency or lack of skill or experience.



12. That your petitioner at no time has been responsible in any way for the demoralized market conditions; that, on the contrary, your petitioner was called upon by the Government to prove by affidavit in the *Rock Royal* case that the activities of the defendants in that case in marketing their milk in disregard of the Order and in failing to pay into the pool had created market conditions which made compliance by your petitioner and other handlers impossible.

13. That after the decision by this Court in the case of *United States v. Rock Royal Co-Operative, Inc.*, 307 U. S. 533, the Federal and State Orders were reinstated as of July 1st, 1939, and promptly thereafter the Government brought suit against your petitioner for a mandatory injunction to compel your petitioner to pay to the Market Administrator the "pool obligation" for the milk handled by your petitioner in November and December, 1938, and January, 1939, a period during which the Federal and State Orders were not being enforced against handlers generally and during which period they were not being complied with by most handlers. Such claim against your petitioner amounts to the sum of \$46,618.67.

14. That promptly after the commencement of this suit by the Government, the Commissioner of Agriculture and Markets of the State of New York applied for leave to intervene and, upon permission granted, filed a complaint setting forth, in substance, that your petitioner is a handler within the definition of the State Order and is subject to the terms of that Order, and praying for enforcement of the State Order against your petitioner.

15. That your petitioner opposed the suit of the Government seeking to enforce the Federal Order against it, on the ground, among others: (1) that your petitioner's operations are not in interstate commerce and do not directly burden, obstruct or affect interstate commerce and are not, and cannot properly be, within the purview of

the Federal Order; and (2) that market conditions which prevailed during the three months' period preceding the suspension of the Order made enforcement thereof at that time confiscatory, in violation of the due process clause of the Fifth Amendment to the United States Constitution.

16. That upon the motion for preliminary injunction made at the time of the commencement of this suit, the United States District Court for the Northern District of New York made an order, in mandatory form, requiring your petitioner to pay to the Market Administrator the sum of \$46,618.67; that the Circuit Court of Appeals for the Second Circuit reversed that order upon the sole ground that such injunctive relief might not properly be granted as a preliminary order, with an opinion, reported in 107 Fed. (2nd) 987, in which the Circuit Court of Appeals indicated that it interpreted the decision of this Court in the *Rock Royal* case to mean

"that milk which has not crossed a state line but which is distributed in a marketing area in such a way that its marketing is merely part of what is from the public standpoint one marketing operation, which includes interstate milk, may be the subject of federal regulation whenever that is necessary to prevent a direct burden upon or obstruction to the coming of interstate milk into the marketing area";

that the Circuit Court of Appeals, so construing the decision of this Court in the *Rock Royal* case, held that your petitioner's activities, even though wholly within the State of New York, and affecting milk handled exclusively within the State and free from contact with interstate milk, might be subject to the Federal Order by reason of the fact that such milk was sold in the New York City market in competition with such interstate milk; that the opinion of the Circuit Court of Appeals further indicated that the enforcement of the Order during the period of demoralized market conditions would not violate the due process clause

of the Fifth Amendment; that "though it may have been a hard choice" your petitioner was at liberty to conduct its business in compliance with the Order, although at a prohibitive loss, or to cease doing business, or to continue its business without compliance and run the risk of the consequences; that in support of its holding that the enforcement of the Order did not infringe upon your petitioner's constitutional rights, the Circuit Court of Appeals cited the case of *Hegeman Farms Corporation v. Baldwin*, 293 U. S. 163.

17. That the Government, having previously moved for summary judgment, applied to the District Judge immediately for an order on such motion; that the District Court granted such motion and entered a final decree directing the defendant to pay to the Market Administrator the sum claimed by the Government, to wit, \$46,796.66 (record, p. 77).

18. That upon appeal to the Circuit Court of Appeals, that Court affirmed the decree appealed from with a *per curiam* opinion referring to its earlier determination on the appeal from the order granting a preliminary injunction.

19. That this Court has jurisdiction to review the judgment of the Circuit Court of Appeals, this petition being for a writ of certiorari to the said Court authorized by Section 240(a) of the Judicial Code as amended (28 U. S. C. A., Section 347).

20. That the questions presented are:

(a) whether or not the Secretary of Agriculture of the United States, acting under the Agricultural Marketing Agreement Act of 1937, may regulate the marketing of milk produced within the State of New York and handled and marketed wholly within that state, without physical contact or commingling with "interstate" milk, solely by reason of the fact that it is ultimately sold in the City of New York in competition with such "interstate" milk;

(b) whether or not the provisions of Order No. 27 fixing the minimum price to be paid by handlers to producers for Class I milk (for fluid consumption) do violence to the due process clause of the Fifth Amendment during periods when the prescribed price exceeds the prevailing wholesale market price at which such milk can be resold.

21. Your petitioner respectfully urges that this case is one in which it is proper for this Court to issue a writ of certiorari for the following reasons:

1. Because an important and vital question of law is involved touching upon the scope of the Federal power, under the Commerce Clause, over wholly intrastate activities which has not been the subject of direct determination by this Court in any similar case.

2. Because the *Rock Royal* case has given rise to uncertainty as to whether such wholly intrastate activities in the handling of milk are within the sphere of Federal control where the milk so handled does not use facilities of interstate commerce and is not physically or inextricably intermingled with interstate milk but is produced for sale in the marketing area in competition with interstate milk. Such uncertainty arises out of the fact that the milk of the handlers in the *Rock Royal* case was concededly transported to the New York City market in interstate commerce and hence stood on a different footing from the milk handled by your petitioner. The uncertainty is evidenced by the position taken by the State Commissioner of Agriculture and Markets that such handling by your petitioner is within the scope of the concurrent State Order, rather than of the Federal Order.

3. Because the determination sought to be reviewed involves a vital question of constitutional law touch-

ing upon the due process clause of the Fifth Amendment to the United States Constitution which has not been heretofore determined by this Court under similar facts.

WHEREFORE, your petitioner respectfully prays that this Honorable Court will be pleased to grant a writ of certiorari in this case to the Circuit Court of Appeals for the Second Circuit to bring this cause to this Honorable Court for such proceedings as may be just.

Dated, New York, May 12th, 1940.

ADLER'S CREAMERY, INC.,

By SAMUEL ADLER,

President.

SAMUEL RUBIN,

Attorney for Petitioner.

State of New York,

County of New York—ss.:

SAMUEL ADLER, being duly sworn, deposes and says: that he is the president of Adler's Creamery, Inc., the petitioner herein; that he has read the foregoing petition; that the same is true to his own knowledge, information and belief; that his knowledge is derived from the record in this case and facts with which he is personally acquainted.

SAMUEL ADLER.

Sworn to before me this

12th day of May, 1940.

MARY GLICK,

Notary Public, Kings County.

Kings Co. Clk's No. 350, Reg. No. 2382.

Cert. filed N. Y. Co. Clk's No. 966, Reg. No. 2G575.

Commission expires March 30, 1942.